STATE OF MICHIGAN

COURT OF APPEALS

RODNEY WOZNIAK,

Plaintiff-Appellant,

v

TAMMY SWEET,

Defendant-Appellee.

UNPUBLISHED
April 24, 2007

No. 274803
Presque Isle Circuit Court
LC No. 04-082679-DS

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted defendant primary physical custody of their minor son. We affirm.

Plaintiff and defendant are the parents of Hunter who was born on December 19, 2000. When the parties ended their relationship, plaintiff filed this action for custody of Hunter. The trial court found that Hunter had an established custodial environment with defendant, but awarded the parties joint legal and physical custody and directed the parties to work out a parenting time schedule. Though the parties lived approximately 200 miles apart, they agreed to alternate parenting time every two weeks. However, the trial court also observed that if the parties could not work out a parenting time arrangement when Hunter was old enough to attend school, the court would hold a hearing to determine where the child would live during the school year. When Hunter became old enough to start kindergarten, the parties did not agree on a new parenting time arrangement and, pursuant to the trial court's instruction, plaintiff filed a notice of hearing. After an evidentiary hearing and analysis of the best interest factors, MCL 722.23, the trial court ruled that Hunter should live primarily with defendant during the school year, with substantial parenting time for plaintiff during the summer and at other times throughout the year.

I. Burden of Proof

Plaintiff contends that the trial court erred when it failed to apply a clear and convincing evidence standard because the court found that Hunter had a "shared custodial environment" with both parents. While the trial court's opinion is inartfully worded, the record reflects that the trial judge did not alter its initial finding of an established custodial environment with defendant, and merely observed that the parties shared roughly equal parenting time for the 18 months prior to the evidentiary hearing. In other words, the court merely described the agreed-upon shared

parenting time arrangement that had existed since the 2005 opinion in which the court found that an established custodial environment existed with defendant.

Specifically, the court's January 10, 2005 opinion shows that the judge clearly understood his responsibility to consider whether an established custodial environment existed and the appropriate burden of proof. The court's use of the phrase "established custodial environment" in that opinion, coupled with its demonstrated knowledge of the statutory scheme, suggests that, in the July 26, 2006 opinion, the court was alluding to something different when referencing the "shared custodial environment." This reading is supported by the court's discussion of best interest factor (j), in which it referenced defendant's "encourage[ment of] a shared custodial relationship between herself and [the child's] father prior to the time when he would have to attend school on a full time basis." The court's characterization of the relationship between the parties—not their relationship to the child—as a "shared custodial relationship" also supports this conclusion.

Further, in the court's September 1, 2006 opinion in which it denied plaintiff's motion for reconsideration, the judge opined: "The Defendant mother was previously designated the primary physical custodian of the minor child but for the preceding eighteen (18) months the parties had devised a shared parenting time arrangement." Here, the court characterized the physical custodial arrangement in the preceding 18 months as "a shared parenting time arrangement." Considering its descriptions together, it is clear that, in its July 26, 2006 opinion, the court was referencing the parenting time arrangement, not the established custodial environment. Accordingly, the order does not suggest that the trial court altered its earlier ruling that the established custodial environment was with defendant. Moreover, while plaintiff disputes the trial court's assertion that he initiated the custody proceedings, the trial court was correct. Plaintiff filed this action for physical custody of Hunter, the trial court found an established custodial environment with defendant, and the parties knew and agreed that a permanent custody ruling would be necessary once Hunter reached school age. While plaintiff merely followed the court's directive when he filed the notice of hearing when Hunter was ready to start school, he nonetheless continued to seek physical custody of Hunter in the face of the trial court's finding that Hunter had an established custodial environment with defendant.

For these reasons, plaintiff, and not defendant, was required to present clear and convincing evidence that a change of custody was in Hunter's best interest. Nonetheless, as the trial court conceded when it denied plaintiff's motion for reconsideration, it lowered the burden and analyzed each best interest factor under the preponderance of the evidence standard. MCL 722.27; *Foskett v Foskett***,** 247 Mich App 1, 6; 634 NW2d 363 (2001). While this was erroneous because plaintiff's burden was higher, even under the lower standard, the trial court reached the correct result when it ruled that the best interest factors favor defendant. We will not overturn a trial court's ultimate custody decision unless there is an abuse of discretion and this did not occur here. *Mogle v Scriver,* 241 Mich App 192, 196; 614 NW2d 696 (2000).

II. Best Interest Factors

Plaintiff disputes the trial court's specific findings under MCL 722.23(a), (c), (e), (j), and (k). We affirm a trial court's factual determinations unless the record evidence "clearly preponderates in the opposite direction." *Phillips v Jordan,* 241 Mich App 17, 20; 614 NW2d 183 (2000). The court correctly found that factor (a) favored defendant based on Hunter's

history with her, and the strength of the emotional bond fostered over the 5½ years of his life. Compared to defendant, plaintiff's extended absences during Hunter's first 4 years of life impacted the consistency of the emotional connection between the two.[1]

Plaintiff also argues that, under MCL 722.23(c), the trial court should not have found that the parties are equal in their ability to provide food, clothing, and medical care for Hunter. Plaintiff emphasizes that defendant filed for bankruptcy and had not received a pay increase that she had been expecting at the December 2004 hearing. While the court acknowledged defendant's financial situation, it noted that there was no indication that "Hunter's material needs are not fully met when he is with each of his parents." Plaintiff did not offer any evidence that defendant's capacity to provide Hunter with medical care and to meet his material needs were affected by her bankruptcy filing. Furthermore, at the time of the hearing, defendant had been working for the same employer for over two years and testified that she was taking steps to obtain certification in her field which would lead to an increase in her pay rate. Despite the fact that defendant had not received the raise she had anticipated, there is no indication in the record that she was unable to provide for Hunter.

With respect to the court's finding that factor (e)—permanence of the family unit and custodial homes—favored neither party, plaintiff contends that evidence of defendant's recent moves required the court to find in his favor. Defendant had changed her residence in between the hearings, and lived with her fiancé at the time of the June 2006 hearing. Plaintiff also notes that defendant's older son, Nathan, had lived with her briefly between hearings. Once, during this period, the police were called when Nathan apparently shoved his mother. The trial court found that neither defendant nor plaintiff had established "permanent" family units for Hunter, stating that "[b]oth parties have significant others." At the time of the hearing, plaintiff had been dating the same woman for two years, but she lived in Sault Ste. Marie and had no plans either to move or to marry plaintiff. Similarly, defendant lived with her fiancé at his home, and while they were engaged at the time of the hearing, they also had no immediate plans for marriage. The court acknowledged in its opinion on reconsideration that plaintiff's *residence* was more permanent than defendant's, but stated that this fact had already been considered by the court in the July 26, 2006 opinion and order. Accordingly, neither party had more clearly established a permanent family unit situation for Hunter than the other and the court's finding on this factor was not contrary to the great weight of the evidence.

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[1] Plaintiff contends that the trial court erred when it relied on evidence that preceded the previous custody order under *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). In *Vodvarka*, this Court held that when "determining if a change of circumstances had occurred [sufficient to review an order of custody], the trial court was limited to basing its decision on events occurring after entry of the most recent custody order." *Id*. at 501. Thus, the limitation cited by plaintiff only applies to the initial inquiry of determining whether a change of circumstances warrants a new review of the best interest factors. *Id*. at 508-509. At issue here is the court's subsequent analysis of whether a change in custody serves the best interest of Hunter. Accordingly, plaintiff's argument is unavailing.

The court found in favor of defendant under factor (j)—"[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents"—because she initially requested that the parties maintain a shared parenting time arrangement pending a permanent custody order. Plaintiff argues that the court's finding was erroneous because he did not hinder Hunter's relationship with defendant. That plaintiff did not actively undermine the relationship does not demonstrate a willingness to facilitate defendant's relationship with Hunter. In contrast, defendant's role in promoting "a shared custodial relationship" is a legitimate fact to consider, and the court's finding is not against the great weight of the evidence.

Finally, plaintiff contends that the incident between defendant and her other son, Nathan, should have counted against defendant under factor (k), which addresses incidents of domestic violence. In fact, the court did find that this factor favored plaintiff, but that the incident was not significant. Defendant testified that her older son had moved out of state and would rarely be visiting her in her new home. Further, the incident appeared to be isolated, and plaintiff did not offer any evidence to the contrary. Therefore, the court's finding on this issue was not contrary to the great weight of the evidence.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski